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17
18 **UNITED STATES DISTRICT COURT**
19 **NORTHERN DISTRICT OF CALIFORNIA**
20 **SAN JOSE DIVISION**

21 ALICE SVENSON, individually and on behalf
22 of all others similarly situated,

23 *Plaintiff,*

24 v.

25 GOOGLE, INC., and GOOGLE PAYMENT
26 CORP.,

27 *Defendants.*

Case No.: 5:13-cv-04080-BLF

**PLAINTIFF'S MOTION FOR AND
MEMORANDUM IN SUPPORT OF
MOTION FOR CLASS
CERTIFICATION**

Judge: Honorable Beth Labson Freeman

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Class: All individuals in the United States who, between March 1, 2012 and April 30, 2014, (i) purchased an App on the Google Play Store that cost less than \$300, (ii) using a Google Wallet account tied to a credit or debit card at the time of purchase, and who (iii) had not previously used Google Wallet or Google Checkout to purchase physical goods.

EU Seller Subclass: All members of the Class who purchased an App from a seller located in a European Union member state at the time of the sale.

Respectfully submitted,

ALICE SVENSON, individually and on behalf of all
others similarly situated,

By: /s/ Rafey S. Balabanian
One of Plaintiff's Attorneys

(Additional counsel appear on signature page.)

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INTRODUCTION

Defendant Google, Inc. (“Google”) is perhaps best known to the public for its online search engine and for being one of the most innovative technology companies in history, responsible for casting a seemingly endless light on Silicon Valley. But there are aspects of Google’s business that it would prefer to keep hidden in the shadows: that it is a world leader when it comes to consumer privacy violations and a pioneer at exploiting its users’ data for gain. Indeed, Google has come under constant fire in recent years for everything from allegedly skirting European privacy laws to the unauthorized collection and use of student data in educational settings. This case presents similar issues with respect to Google’s intentional, systematic, and—until the filing of the suit—unchecked violation of its customers’ privacy rights. And it’s those uniform and widespread privacy violations which form the basis of the instant motion for class certification.

Specifically, Plaintiff’s and the proposed Classes’ claims arise out of the use of Google’s digital market place known as the Google Play Store, where consumers can purchase and download movies, music and software applications (together, “Apps”) for use on their Android mobile devices. To facilitate App purchases, Google and its payment-processing division, Defendant Google Payment Corp. (“GPC”), contracted with millions of users to provide secure, private payment processing through a service known as Google Wallet. Relevant here, under the Wallet terms of use, Defendants uniformly promised to safeguard App buyers’ (referred to herein as “Buyers”) personal information and to disclose it only in a limited set of circumstances—e.g., as necessary to process the transaction or maintain a Buyer’s account. But casting aside the express promises made in their own terms of use, for years, Defendants have routinely and systematically disclosed to third-parties, their Buyers’ personal contact and billing information—including, names and email addresses—which they now admit was not necessary to complete the transactions or otherwise authorized for disclosure.

Plaintiff looks forward to proving her claims at summary judgment and potentially trial, but at this stage of the proceedings, the focus is class certification and whether Rule 23’s requirements are satisfied. Here, the path to certification is clear. That’s because, as courts in the Ninth Circuit

1 and throughout the country have consistently held, cases that present systematic breaches of form
2 consumer contracts are readily certifiable under Rule 23(b)(3). Under that analysis, the question is
3 whether this litigation is able to resolve for the entire Class and Subclass—in a single stroke—if the
4 subject disclosures were permissible under the terms of use. Regardless of how the fact finder
5 ultimately comes down on that, the answer to the questions are invariably the same for everyone in
6 the Class and Subclass, making this case readily amenable to class-wide adjudication.

7 Accordingly, Plaintiff requests that the Court certify the Class and Subclass defined below
8 under Rule 23(b)(3), appoint her as class representative, and her attorneys as class counsel.

9 **BACKGROUND**

10 Google is one of the world’s largest technology companies, offering a wide variety of
11 technology and internet services, including its eponymous search engine, an email service (known
12 as gmail), and a smartphone operating system (Android). Relevant here, Google also offers Wallet,
13 a service that facilitates and processes electronic transactions, and Play, an internet-based store
14 where users can purchase Apps for devices running the Android operating system. (See Exhibit
15 (“Ex.”) 1-1 at GOOG-00001191; Ex. 1-2 at GOOG-00001179.) Wallet is the only method by which
16 a consumer can pay for an App on the Play Store, meaning that every consumer who purchased an
17 App on the Play Store must have established a valid Google Wallet account prior to or along with
18 that purchase. (See Ex. 1-2 at GOOG-00001179 (confirming you need a Google Wallet account to
19 purchase products); Exhibit 1-3 at GOOG-00001449 ([REDACTED]
20 [REDACTED]

21 ***Use of Wallet and Play***

22 As a consumer-facing service,¹ Wallet allows users to make purchases on a variety of
23 Google platforms—including Play and YouTube—and on third-party websites that have enabled
24 Wallet (or its predecessor, Google Checkout) for payments. (See Ex. 1-4, [REDACTED]
25 [REDACTED] Ex. 1-5, [REDACTED]

26
27 ¹ The term “wallet” has a variety of meanings within Google. (See Ex. 1-4 at 18:14-20.) But
28 here, “Wallet” is used to describe the public-facing service available to consumers under the brand
name Google Wallet. (See Ex. 1-5 at 35:18-19.)

1 [REDACTED]
2 [REDACTED] *id.* at 27:6-9 ([REDACTED]) To use
3 Wallet, a consumer must have an existing Google account and associated gmail address. (*See* Ex. 1-
4 1 at GOOG-00001193–94 (requiring users to provide accurate registration information and keep
5 information current); Exhibit 1-6, [REDACTED]) Any such user can then
6 access Wallet through a web browser or the Wallet mobile App. (*See* Ex. 1-1 at GOOG-00001199-
7 1200.) At all relevant times, users of the Wallet App agreed to the Wallet Terms of Service then in
8 effect, which incorporated the Wallet Privacy Policy, as well as the more general Google Privacy
9 Policy. (*See id.* at GOOG-00001193; *id.* at GOOG-00001207; Ex. 1-7 at GOOG-00000997-998.)
10 Additionally, each time a Buyer purchased an App, they agreed to the operative Terms of Service.
11 (*See* Ex. 1-4 at 157:6-20 ([REDACTED]))

12 At all times relevant, the Wallet Privacy Policy provided that Google would share a user’s
13 personal information *only*: (1) as permitted under the Google Privacy Policy; (2) as necessary to
14 process a transaction and maintain a user’s account; or (3) to complete a user’s registration for a
15 third-party service. (Ex. 1-7 at GOOG-00000998.) The Google Privacy Policy, in turn, allows for
16 disclosure of that same information *only*: (1) [REDACTED] (2) [REDACTED]
17 [REDACTED]; (3) [REDACTED] and (4) “[REDACTED]
18 [REDACTED]” (*See* Ex. 1-8 at GOOG-00000114.)

19 Thus, between them, the Wallet Privacy Policy and the Google Privacy Policy (collectively “the
20 Privacy Policies”) set forth six limited scenarios in which Google could disclose consumers’
21 personal information. Beyond those six scenarios, by their own terms, Defendants had no authority
22 to disclose Buyers’ personal information.

23 Google Play, the successor to a platform known as Android Market, is a digital marketplace
24 where users can purchase digital goods and services, including Apps. (*See* Ex. 1-9, [REDACTED]
25 [REDACTED]
26 *see generally* Ex. 1-2 at GOOG-00001179.) Play can be accessed by web browser or through the
27 Google Play App, which comes pre-installed on all Android devices. (*See generally* Ex. 1-2 at
28 [REDACTED])

1 GOOG-00001179; Ex. 1-10 at GOOG-00006571; Ex 1-3, at GOOG-00001506 at 109:19-20; *id.* at
2 GOOG-00001574 at 177:15-16.) Throughout the Class period, when a Class member purchased an
3 App, he or she would be required to assent to the most recent Google, Google Play, and Google
4 Wallet Terms of Service and Privacy Policies. (See Ex. 1-11 at GOOG-00009091 [REDACTED]
5 [REDACTED]; Ex. 1-7 at GOOG-
6 00000997; Ex. 1-1 at GOOG-00001191.) In so doing, the Class members created new contracts
7 with Defendants, providing for the execution of specific transactions (i.e., payment in exchange for
8 App), governed by the operative Wallet Terms and Privacy Policy. (See Ex. 1-12 at GOOG-
9 00002898 (“[REDACTED]

10 ***Google Systematically Disclosed Class Members’ Personal Information to App Vendors.***

11 Despite the provisions of the Privacy Policies, every time a Class member purchased an App
12 on the Play Store, Defendants disclosed personal information to the App vendor.² (See Ex. 1-13 at
13 Ans. to Interrog. No. 1.) They disclosed that information in a variety of ways. The first was known
14 as the [REDACTED] (originally—i.e., prior to the introduction of Wallet—known as [REDACTED]
15 [REDACTED], and later as [REDACTED], or [REDACTED]). (See *id.*; Ex. 1-14
16 at GOOG-00001969-1970 ([REDACTED]
17 [REDACTED]
18 [REDACTED]); Ex. 1-15 at GOOG-00001089
19 ([REDACTED] Ex. 1-16 at GOOG-00001093 ([REDACTED]
20 [REDACTED].) Prior to [REDACTED], the [REDACTED] automatically
21 disclosed and displayed each Buyer’s [REDACTED], as well as [REDACTED]
22 [REDACTED] using Wallet
23 or Checkout. (Ex. 1-13 at Ans. to Interrog. No. 1.) From [REDACTED] through [REDACTED],
24 Defendants transitioned [REDACTED] to the [REDACTED]
25 [REDACTED]. (*Id.*) Once that was complete, a Buyer’s [REDACTED]

26 ² Despite what users may expect, Google does not conduct any sort of background checks or
27 vetting process for vendors prior to offering their Apps on the Play Store. (See Ex. 1-4 at 218:13-
28 17.) Instead, Google generally relies on the Play “community” to distinguish good developers from
bad. (*Id.* at 219:12-18.)

1 [REDACTED] were disclosed to the App
2 vendors. (Ex. 1-17 at GOOG-00003391 [REDACTED]
3 [REDACTED]; Ex. 1-18 at GOOG-00008234 [REDACTED]
4 [REDACTED].) After this case was filed in May 2014, Defendants [REDACTED]
5 [REDACTED] (See Ex. 1-19 at GOOG-00003327
6 [REDACTED] Ex. 1-3 at
7 GOOG-00001478, at 81:13-19 [REDACTED]³

8 A second way that Defendants disclosed Buyers' personal information was through a feature
9 known as the [REDACTED]⁴ a tool that allowed App vendors to [REDACTED]
10 [REDACTED], rather than [REDACTED]
11 and [REDACTED] that information. (See Ex. 1-14 at Ans. Interrog. No. 1; Ex. 1-20 at
12 GOOG-00005451; Exhibit 1-21, [REDACTED]
13 [REDACTED].) Until
14 [REDACTED]
15 [REDACTED] provided App vendors with Buyers' [REDACTED]
16 [REDACTED]
17 [REDACTED] (See Ex. 1-13 at Ans. Interrog. No. 1; Ex. 1-22, [REDACTED]
18 [REDACTED])
19 and continued to [REDACTED]
20 [REDACTED] (See Ex. 1-13 at Ans. to Interrog. No. 1.)

21 Another way Defendants disclosed personal information about Buyers to App vendors was

22
23 ³ Whether App vendors opened and viewed [REDACTED] (they did) is
24 beside the point. (See Ex. 1-14 at GOOG-00002024-2025 at 118:15-119:16; Ex. 1-23 at GOOG-
25 00002260-2267 [REDACTED].) The fact that Defendants made Buyers' personal
26 information available to App vendors through [REDACTED] in direct contravention of their
27 App purchase agreements and without their consent alone rises to the level of an unauthorized
28 disclosure. Notwithstanding, whether Defendants' conduct constitutes an unlawful disclosure of
Buyers' information is a merits question that (as explained below) can be answered on a classwide
basis and therefore, supports Plaintiff's bid for certification.

⁴ [REDACTED] (See Ex. 1-21 at 38:18-21.)

1 through [REDACTED], a [REDACTED]
2 [REDACTED]. (See Ex. 1-24, [REDACTED] at
3 108:11-13; Ex. 1-6 at 42:13-21.) Throughout the class period, the [REDACTED]
4 displayed Buyers' [REDACTED]
5 (see Ex. 1-25, [REDACTED] at 57:18-58:23), and made available [REDACTED]
6 containing Buyers' [REDACTED]. (See Ex. 1-3 at GOOG-00001470 at 73:2-18.⁵)

7 In addition to the scenarios laid out above, [REDACTED]
8 [REDACTED] the disclosure of additional Buyer information. (See Ex. 1-13 at Ans. to Interrog. No. 1.) For
9 instance, from [REDACTED]
10 [REDACTED] when Buyers
11 purchased Apps [REDACTED]. (See *id.*; Ex. 1-26 at GOOG-
12 00008880-8904 ([REDACTED] From [REDACTED]
13 [REDACTED], a [REDACTED], once again causing Buyers' [REDACTED]
14 [REDACTED].
15 (See Ex. 1-13 at Ans. Interrog. No. 1; Ex. 1-27 at GOOG-00003783; Ex. 1-28 at GOOG-00006728.)

16 In sum, at all times between March 1, 2012 and April 30, 2014, Defendants, in direct
17 contravention of their express contractual obligations, disclosed (at a minimum) each App Buyer's
18 name and email address to third-party vendors without authorization.

19 ARGUMENT

20 Plaintiff seeks certification of the following class and subclass under Rule 23(a) and (b)(3):

21 **Class:** All individuals in the United States who, between March 1, 2012 and April 30,
22 2014, (i) purchased an App on the Google Play Store that cost less than \$300, (ii) using a
23 Google Wallet account tied to a credit or debit card at the time of purchase, and who (iii)
had not previously used Google Wallet or Google Checkout to purchase physical goods.⁶

24 ⁵ Again, regardless of whether vendors actually downloaded the information through the [REDACTED]
25 [REDACTED], the fact that Defendants made the information available alone
constitutes unlawful disclosure. (See Ex. 1-3 at GOOG-00001468-1469 at 71:25-72:12; GOOG-
26 00001579 at 182:19-24 ([REDACTED]).) That also raises several common questions, as explained below.

27 The Class is limited to those individuals who purchased Apps for less than \$300 and had not
previously purchased physical goods through either Google Wallet or Checkout to avoid variations
28 in the information collected and disclosed. For example, the policies that applied to purchases
greater than \$300 (as they relate to fraud prevention and taxation) varied as to what information was

1 **EU Seller Subclass:** All members of the Class who purchased an App from a seller
2 located in a European Union member state at the time of the sale.⁷

3 Rule 23 provides that a “class action may be maintained if two conditions are met: The suit must
4 satisfy the criteria set forth in subdivision (a) (*i.e.*, numerosity, commonality, typicality, and
5 adequacy of representation), and it also must fit into one of the three categories described in
6 subdivision (b).” *Shady Grove Ortho. Assoc., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010).
7 Rule 23(b)(3) requires a plaintiff to show that common questions of law or fact predominate over
8 any issues affecting only individual members of the proposed class, and that maintaining the lawsuit
9 as a class action is superior to other methods of adjudication. Fed. R. Civ. P. 23(b)(3); *see also*
10 *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011).

11 Here, the proposed Class and Subclass readily satisfy the requirements of Rule 23. They
12 consist of a group of individuals who made similar purchases, pursuant to uniform contractual terms
13 and information-disclosure policies, and with the same failure to protect the privacy of their
14 personal information. Common issues therefore predominate among their claims, and classwide
15 litigation is clearly superior. In short, the proposed Class and Subclass should be certified, Plaintiff
16 should be appointed as class representative, and her attorneys should be appointed as class counsel.

17 **II. The Proposed Class and Subclass are Ascertainable.**

18 First, “[t]hough not one of the explicit requirements of Rule 23(a), courts recognize that ‘the
19 class sought to be represented must be adequately defined and clearly ascertainable.’” *I.B. by and*
20 *through Bohannon v. Facebook, Inc.*, 82 F. Supp. 3d 1115, 1126 (N.D. Cal. 2015) (Labson

21 required and would be disclosed to vendors. (See Ex. 1-13 at Ans. Interrog. No. 1: Ex. 1-10 at
22 GOOG-00006617-6618; Ex. 1-29 at GOOG-00005126 [REDACTED]
23 [REDACTED].) Likewise with respect to purchases of physical goods, which resulted in the collection of
24 varying forms of information for different purposes. (See Ex. 1-13 at Ans. Interrog. No. 1.) By
25 contrast, the Class as defined eliminates such variations in the types of information disclosed and
26 the necessity (or more aptly, lack thereof) for doing so: at a minimum, each Class member had their
27 name and email address disclosed despite that information not being necessary to complete the
28 transaction at issue or the disclosure otherwise being authorized.

7 Excluded from the Class and Subclass are: (1) any Judge or Magistrate presiding over this
action and members of their families; (2) Defendants, their subsidiaries, parents, successors,
predecessors, and any entity in which Defendants or their parents have a controlling interest, and its
current or former employees, officers, and directors; (3) persons who properly execute and file a
timely request for exclusion from the Class; (4) persons whose claims in this matter have been
finally adjudicated on the merits or otherwise released; (5) Plaintiff’s counsel and Defendants’
counsel; and (6) the legal representatives, successors, and assigns of any such excluded persons.

1 Freeman, J.) (quotation omitted)). “A class should be sufficiently definite and ‘clearly ascertainable’
2 by reference to objective criteria ‘so that it is administratively feasible [for a court] to determine
3 whether a particular person is a class member’ and thus ‘bound by the judgment.’” *Ellsworth v. U.S.*
4 *Bank, N.A.*, No. 12-cv-2506, 2014 WL 2734953, at *12 (N.D. Cal. June 13, 2014) (quoting *Shepard*
5 *v. Lowe’s HIW, Inc.*, No. 12-cv-3893, 2013 WL 4488802, at *2 (N.D. Cal. Aug. 19, 2013)). “[T]he
6 identity of the class members need not be known at the time of certification” and a definition is
7 sufficiently ascertainable as long as “it includes objective characteristics that would permit a
8 consumer to identify themselves as a member of the proposed class.” *Zeisel v. Diamond Foods,*
9 *Inc.*, No. 10-cv-1192, 2011 WL 2221113, at *6 (N.D. Cal. June 7, 2011).

10 Because the proposed Class and Subclass are defined by reference to objective facts
11 reflected in Defendants’ records, they are sufficiently ascertainable. Indeed, whether any Buyer is a
12 member of the Class can be determined by answering four objective, yes-or-no questions:

- 13 (1) Did the individual use Google Wallet to purchase an App on the Google Play store
14 between March 1, 2012 and April 30, 2014?
- 15 (2) Did the App cost less than \$300?
- 16 (3) Was the individual’s Google Wallet account tied to a credit or debit card at the time
17 of the purchase?
- 18 (4) Before purchasing the App, had the individual used Google Wallet or Google
19 Checkout to purchase physical goods?

20 Likewise, determining whether an individual is a member of the proposed Subclass only requires
21 the resolution of a single, additional yes-or-no question:

- 22 (5) Did the individual purchase an App from a seller located in an EU member state?

23 Further, each of these questions can be answered by referencing digital records maintained
24 by Defendants. (See Ex. 1-3 at GOOG-00001460 at 63:17-22; see also Ex. 1-30 at GOOG-
25 00001392 ([REDACTED]); Ex. 1-15 at
26 GOOG-00001089 [REDACTED]
27 [REDACTED]; Ex. 1-31 at GOOG-00001090-92 ([REDACTED]);
28 Ex. 1-16 at GOOG-00001093 ([REDACTED]
[REDACTED]); Ex. 1-32 at GOOG-00001394 ([REDACTED]

1 Ex. 1-33 at GOOG-00001190 ([REDACTED]) Ex. 1-34 at Resp.

2 Req. Admit No. 1 ([REDACTED])
3 [REDACTED] *id.* at Resp. Req. Admit No. 2 (showing
4 records identify if a [REDACTED]; Ex. 1-22 at 44:14-15 ([REDACTED])
5 [REDACTED] Ex. 1-21 at 71:14-72:15
6 ([REDACTED]) No reference to
7 any outside records or manual record review will be necessary to determine class membership.⁸

8 In cases (like this) against digital services providers where the proposed class is defined by
9 reference to information contained within the defendant's records, courts in this District regularly
10 find the ascertainability requirement satisfied. By way of example, this Court certified a class of
11 minors who used Facebook during a specific time period and a subclass of those who purchased
12 "credits" during a specific time period, where the information necessary to evaluate any individual's
13 membership would be found entirely within the defendant's records. *See Bohannon*, 82 F. Supp. 3d
14 at 1126 (Labson Freeman, J.) (noting that while the defendant "claim[ed] that it [could] not
15 determine whether or not [any] minor had consent to make a given purchase" it did not argue "that
16 it [could not] ascertain, through its records, whether a purchase was made from the minor's account,
17 or whether an account was registered to a minor at the time the account was made."). Likewise, the
18 Honorable Edward M. Chen recently certified a class in a case against the ride-sharing service Uber,
19 where the class was composed of individuals who received a specific email from the defendant and
20 made a purchase, and found the class to be ascertainable because the class was "objectively
21 ascertainable from Uber's business records" since Uber had "presumably maintained copies of the
22 promotional emails that were sent." *Ehret v. Uber Techs., Inc.*, No. 14-cv-113, 2015 WL 7759464,

23 ⁸ Additionally—and relevant to providing notice to the proposed Classes—each individual
24 member can be identified by their name and email address, which were provided as part of the
25 Wallet setup process. (See Ex. 1-1 at GOOG-00001193 (requiring, *inter alia*, provision of name and
26 contact information, including email); *id.* at GOOG-00001194 (requiring registration information to
27 be accurate and all elements on registration web pages to be complete to use service); Ex. 1-13 at
28 Ans. Interrog. No. 1; Ex. 1-3 at GOOG-00001454 at 57:1-10 ([REDACTED]); Ex. 1-35 at GOOG-
00007584 ([REDACTED]) Ex. 1-21 at 23:11-24 ([REDACTED])

1 at *3 (N.D. Cal. Dec. 2, 2015); *see also Wolph v. Acer Am. Corp.*, No. 09-cv-1314, 2012 WL
2 993531, at *2 (N.D. Cal. Mar. 23, 2012) (“An individual is a member of the class if he or she
3 purchased the notebook at issue and did not return it. Acer does not dispute that the identity and
4 contact information for a significant portion of these[] individuals can be obtained from the
5 warranty registration and through Acer’s customer service databases.”).

6 Similarly, the proposed Class and Subclass are “readily ascertainable” from Google’s own
7 records, which identify [REDACTED]
8 [REDACTED]. (See Ex. 1-3 at GOOG-00001460 at
9 63:20-21 [REDACTED].”); GOOG-
10 00001463 at 66:18-20 ([REDACTED]));
11 *see also Ellsworth* 2014 WL 2734953, at *13 (finding class “ascertainable from the records, even if
12 it ‘[would] entail some effort on the part of counsel for both parties’ to identify the class
13 members.”) (citation omitted)). The ascertainability requirement is thus clearly satisfied.

14 **III. The Proposed Class and Subclass Meet Rule 23(a)’s Requirements.**

15 The proposed Class and Subclass also easily meet Rule 23(a)’s requirements of numerosity,
16 commonality, typicality, and adequacy.

17 **A. The proposed Class and Subclass are sufficiently numerous.**

18 A class is sufficiently numerous when “the joinder of all members is impracticable.” Fed. R.
19 Civ. P. 23(a)(1). “There is no magic number that will satisfy the numerosity requirement, but
20 numerosity has been found when a class comprised forty or more members, and not found when the
21 class comprised twenty-one or fewer members.” *Lymburner v. U.S. Fin. Funds, Inc.*, 263 F.R.D.
22 534, 539 (N.D. Cal. 2010) (collecting cases). Further, courts may make common sense assumptions
23 regarding the numerosity of a proposed class. *See In re Rubber Chems. Antitrust Litig.*, 232 F.R.D.
24 346, 350–51 (N.D. Cal. 2005).

25 Here, the proposed Class numbers in the millions. During the last year of the Class period
26 alone, the Play Store generated more than \$5 billion in revenue across millions of sales that fall
27 within the scope of the Class definition. *See* Brahim Elbouchikhi, *LinkedIn Profile Page*, available
28

1 at <https://www.linkedin.com/in/elbouchikhi> (last visited June 3, 2016). Given that Google has
2 boasted that it recently topped one *billion* active Google Play users,⁹ it should come as no surprise
3 that it will not be contesting numerosity. (See Ex. 1-36 at Ans. Interrog. No. 13.) The proposed
4 Subclass likely numbers in the millions as well, given that tens of thousands of App developers
5 operate out of the EU and several of the highest-grossing Apps belong to EU vendors. See *Top Paid*
6 *in Android Apps*, Google Play, [https://play.google.com/store/apps/collection/topselling_](https://play.google.com/store/apps/collection/topselling_paid?hl=en)
7 [paid?hl=en](https://play.google.com/store/apps/collection/topselling_paid?hl=en) (last visited June 3, 2016) (showing list of top-paid Apps from Google Play website,
8 with two out of the top five including EU App developers Mojang (Sweden) and RobTop games
9 (Sweden)); Artyom Dogtiev, *Mobile App Developer Statistic Roundup*, AppIndex, Jan. 20, 2016,
10 <http://appindex.com/app-development/mobile-app-developer-statistics-roundup/> (last visited June 3,
11 2016) (report from January 2016 showing that nearly 30% of app developers are located in Europe).

12 Accordingly, both the proposed Class and Subclass far exceed the 40-person threshold
13 necessary for a finding of numerosity. See *In re Rubber Chems.*, 232 F.R.D. at 350–51; *Arnold v.*
14 *United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D. Cal. 1994) (inferring class size of
15 thousands where nearly 900,000 individuals in state were disabled and defendant operated 70
16 locations subject to claims); *Dennis v. Kellogg Co.*, No. 09-cv-1786, 2013 WL 1883071, at *2 (S.D.
17 Cal. May 3, 2013) (finding numerosity where “exact class size [was] unknown,” but “the putative
18 class potentially cover[ed] hundreds of thousands of purchases . . . nationwide.”).

19 **B. Members of the Class and Subclass share common issues of law and fact.**

20 Next, Rule 23(a)(2) requires that “there are questions of law or fact common to the class.”
21 Fed. R. Civ. P. 23(a)(2). As the Supreme Court explained in *Wal-Mart Stores, Inc. v. Dukes*,
22 “[w]hat matters to class certification . . . is not the raising of common ‘questions’—even in
23 droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive
24 the resolution of the litigation.” 564 U.S. 338, 350 (2011). All issues of fact and law need not be
25 identical, as long as the class representative “retain[s] a common core of factual or legal issues with
26

27 ⁹ See Alicia Marie Tan, *Google Play just hit a major milestone*, Mashable (Sept. 29, 2015),
28 <http://mashable.com/2015/09/29/google-play-1-billion-users/#B4wdQfPzmuqY> (last visited June 2,
2016).

1 the rest of the class.” *Parra v. Bashas’, Inc.*, 536 F.3d 975, 978–79 (9th Cir. 2008). The standard is
2 “construed permissively,” *id.* at 978, and “[i]t is not necessary that members of the proposed class
3 share every fact in common.” *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1030 (9th Cir.
4 2012) (internal quotations omitted). Even a single common question of law or fact will do. *See*
5 *Dukes*, 564 U.S. 338 at 359. Commonality simply requires that the claims “depend upon a common
6 contention . . . of such a nature that it is capable of classwide resolution—which means that
7 determination of its truth or falsity will resolve an issue that is central to the validity of each of the
8 claims in one stroke.” *Id.* at 350.

9 Here, the claims of Plaintiff and the proposed Class and Subclass members all arise from a
10 single common contention: Defendants breached their obligations to not disclose Buyers’ personal
11 information except as provided in the Wallet and Google Privacy Policies. Thus, Defendants’
12 standardized conduct—i.e., the automatic disclosure of user information upon purchase of an App—
13 raises several common questions, the answers to which “will resolve an issue that is central to the
14 validity of each one of the claims in one stroke.” *Id.*

15 *1. Whether Plaintiff, the Class and Subclass were entitled to protection of their*
16 *personal information is a common question.*

17 Google does not dispute that every Buyer during the relevant time period agreed to the
18 Google Terms of Service and Privacy Policy, the Google Wallet Terms of Service, and the Google
19 Play Terms of Service and Privacy Policy. Thus, the first question to be answered when analyzing
20 the claims asserted is whether Buyers’ personal information was entitled to protection from
21 disclosure. Given that the operative agreements had materially identical provisions throughout the
22 Class period, such a question is obviously common to all Class and Subclass members. (*Compare*
23 *“Information sharing” and “Information we share” sections of Google and Wallet Privacy Policies*
24 *from Oct. 3, 2010 through May 7, 2014 at Ex. 1-37 at GOOG-00000385-86, Ex. 1-38 at GOOG-*
25 *00000086, Ex. 1-39 at GOOG-00000100-0101, Ex. 1-8 at GOOG-00000114-0115, Ex. 1-40 at*
26 *GOOG-00000190-0191, Ex. 1-41 at GOOG-00000225-0226, Ex. 1-42 at GOOG-00000315-0316;*
27 *Ex. 1-43 at GOOG-00000857-0858, Ex. 1-44 at GOOG-00000993-0994, Ex. 1-7 at GOOG-*
28 *00000998, Ex. 1-45 at GOOG-00001021-1022.*)

1 As courts throughout this District and others have acknowledged, cases involving the
2 interpretation of form contracts are ripe for certification:

3 “California recognizes the objective theory of contracts, under which it is the
4 objective intent, as evidenced by the words of the contract, rather than the subjective
5 intent of one of the parties, that controls interpretation . . . [t]he parties’ undisclosed
6 intent or understanding is irrelevant to contract interpretation.” *Founding Members*
7 *of the Newport Beach Country Club v. Newport Beach Country Club, Inc.*, 109 Cal.
8 App. 4th 944, 956 (2003) (internal citations and quotation marks omitted). It is for
9 this reason that, “[w]hen viewed in light of Rule 23, claims arising from
10 interpretations of a form contract appear to present the classic case for treatment as a
11 class action, and breach of contract cases are routinely certified as such.” *Ewert v.*
12 *eBay, Inc.*, No. 07-cv-02198 RMW, 2010 WL 426259, at *7 (N.D. Cal. Oct. 25,
13 2010) (quoting *Kleiner v. First Nat’l Bank*, 97 F.R.D. 683, 691 (N.D. Ga. 1983)).
14 *Rodman v. Safeway, Inc.*, No. 11-cv-3003, 2014 WL 988992, at *7 (N.D. Cal. Mar. 9, 2014); *see*
15 *also In re Med. Cap. Sec. Litig.*, No. 10-cv-2145, 2011 WL 5067208, at *3 (C.D. Cal. July 26,
16 2011) (“Courts routinely certify class actions involving breaches of form contracts.”) (collecting
17 cases); *Harris v. comScore, Inc.*, 292 F.R.D. 579, 585 (N.D. Ill. 2013) (finding commonality where
18 “each Class member agreed to a form contract,” and noting that “[i]t is well established that ‘claims
19 arising from interpretations of a form contract appear to present the classic case for treatment as a
20 class action.’”) (quoting *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998)).

21 Thus, the terms of the form contracts agreed to by the Class and Subclass can be determined
22 on a classwide basis, and Rule 23(a)’s commonality requirement is therefore satisfied.

23 2. *Whether Defendants’ disclosures exceeded the scope of the Privacy Policies*
24 *is a common question.*

25 The next common question that can be resolved for the Class and Subclass is whether
26 Defendants breached the privacy provisions of the contracts by disclosing Buyers’ personal
27 information. As the starting point for that analysis, each of the operative Privacy Policies provide
28 that personal information (including that of Buyers’) will be disclosed only (1) with user consent,
(2) to domain administrators, (3) for external processing, (4) for legal reasons, (5) if necessary to
process the transaction, or (6) to complete registration for a service offered by the vendor. (*See* Ex.
1-37 at GOOG-00000385-0386; Ex. 1-38 at GOOG-00000086; Ex. 1-39 at GOOG-00000100-0101;
Ex. 1-8 at GOOG-00000114-0115; Ex. 1-40 at GOOG-00000190-0191; Ex. 1-41 at GOOG-
00000225-0226; Ex. 1-42 at GOOG-00000315-0316; Ex. 1-43 at GOOG-00000857-0858; Ex. 1-44

1 at GOOG-00000993-0994; Ex. 1-7 at GOOG-00000998; Ex. 1-45 at GOOG-00001021-1022.)

2 In addition to the uniformity of the contractual terms at issue and the types of information
3 disclosed, the analysis to determine whether it was necessary to disclose that information will be
4 common to the Class and Subclass as well. First, there is perhaps no better evidence of the lack of
5 necessity in disclosing a Buyer's name and email address to complete a transaction (or lack of other
6 authorization to disclose it) than the fact that after the filing of this lawsuit, Defendants ceased
7 disclosing this information to vendors altogether. Notwithstanding, they have successfully
8 continued selling Apps through the Play Store. (Ex. 1-13 Ans. Interrog. No. 1; Ex. 1-14 at GOOG-
9 00002019-20 at 113:13-17 [REDACTED]

10 [REDACTED]
11 [REDACTED]); Ex. 1-25 at 59:14-17.)¹⁰ Likewise, while Google contends that the disclosure of a
12 Buyer's zip code was necessary for tax purposes (to determine the applicable tax rate, if any), [REDACTED]

13 [REDACTED]
14 [REDACTED]. (Ex. 1-46, [REDACTED]
15 [REDACTED] at 27:23-28:3.) Given that [REDACTED] was
16 no need for App vendors to receive that information for tax purposes.¹¹

17 In sum, because Defendants disclosed the same information, for the same purposes, under
18 the same circumstances throughout the Class period, whether they breached their contractual
19 obligations to the Class and Subclass can be assessed on a classwide basis. *Ewert*, 2010 WL
20 4269259, at *7; *Kleiner*, 97 F.R.D. at 692; *Rodman*, 2014 WL 988992, at *7.

21 3. *Whether Defendants interfered with the benefits to which Plaintiff and the*
22 *Class members were entitled under the contracts is a common issue.*

23 The same holds true with respect to the Class's and Subclass's claims for breach of the
24 covenant of good faith and fair dealing. Whether Defendants interfered with the benefits to which

25 ¹⁰ Of course, the fact that the disclosures at issue occurred *after* the transactions took place—
26 i.e., after the Apps were purchased—adds further clarity to the lack of necessity of these disclosures
27 to *completing* the transactions themselves. *See Background, supra*.

28 ¹¹ As to the Subclass specifically, [REDACTED] Rather, [REDACTED]

(*See* Ex. 1-46 at 82:18-23.)

1 Class members were entitled under the Privacy Policies can be assessed on a classwide basis given
2 that (i) the contracts each Class member entered into with Defendants were materially identical, as
3 were the privacy protections to which they were entitled, and (ii) Defendants' disclosures were
4 uniform across all App transactions during the Class period. Thus, a determination as to whether
5 Defendants' uniform conduct interfered with and frustrated the benefits to which each Class and
6 Subclass member was entitled necessarily can be determined by reference to common proof.

7 The *Ellsworth* case is instructive in this regard. There, the plaintiffs brought claims
8 including breach of contract, breach of the implied covenant of good faith and fair dealing, and
9 violations of the UCL where they alleged that the defendant forced backdated flood insurance on
10 their properties and paid substantial kickbacks to the flood insurance company. *Ellsworth*, 2014 WL
11 2734953, at *1. The court noted that the plaintiffs' case presented myriad common questions, as a
12 result of the fact that "Plaintiffs had identical form contracts, the policies were applied uniformly"
13 and "Plaintiffs allege[d] a common scheme" causing harm. *Id.* at *14. The court followed several
14 other courts within this District addressing claims arising out of form contracts and systemic
15 corporate practices and "found commonality under Rule 23(a)(2)." *Id.*

16 The commonality reasoning in *Ellsworth* maps squarely onto the facts of this case. Each
17 Class member agreed to a form Privacy Policy, saw the protections offered by those Privacy
18 Policies frustrated and breached at the moment they undertook the same specific action (i.e., buying
19 an App), and now brings claims for breach of contract, breach of the implied covenant of good faith
20 and fair dealing, and violation of the UCL. As a result, commonality is present here as well.

21 4. *Whether Plaintiff and the Class and Subclass Members suffered damages is a*
22 *common question.*

23 Finally, even though Plaintiff is under no obligation to show that damages can be
24 determined on a classwide basis, *see Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 988
25 (9th Cir. 2015), whether, and to what extent, Plaintiff and the Class and Subclass members were
26 damaged as a result of Defendants' conduct can be determined by reference to common proof as
27 well. As courts in the Ninth Circuit have recognized, all three of the alleged claims—breach of
28 contract, breach of the implied covenant of good faith and fair dealing, and violations of the UCL—

1 provide for recovery determined by objective criteria and under a reasonable person standard. *See*
2 *Ebner v. Fresh, Inc.*, No. 13-cv-56644, 2016 WL 1056088, at *4 (9th Cir. Mar. 17, 2016) (noting
3 California’s “consumer protection statutes are governed by the ‘reasonable consumer’ test.”); *see*
4 *also Brotherson v. Prof. Basketball Club, L.L.C.*, 262 F.R.D. 564, 570–71 (W.D. Wash. 2009)
5 (rejecting argument that “subjective expectations of each [member were] relevant to damages,”
6 finding “no support for this novel view of contract law,” and noting that “[s]ubjective expectations
7 do not govern the determination of contract damages . . . Objectively reasonable expectations do.”).
8 That is especially true in cases such as this, where the plaintiff and the class allege a uniform
9 relationship between themselves and the defendants, and the defendants caused damages through a
10 uniform course of conduct. *See Jordan v. Paul Financial, LLC*, 285 F.R.D. 435, 466 (N.D. Cal.
11 2012) (noting in case involving uniform, material, omissions that “[w]hile the parties dispute the
12 propriety of the model for calculating damages . . . the Court need not decide the precise method . . .
13 at this stage[.]” because the “calculation of damages [would] be sufficiently mechanical that
14 whatever individualized inquiries need occur do not defeat class certification.”)).

15 Notwithstanding, Plaintiff’s expert, through the use of a survey identifying consumer
16 preferences, and approximating the proverbial “reasonable” consumer, has established a formula for
17 determining damages by reference to (1) the types(s) of Buyer information disclosed and (2) the
18 purchase price of the App at issue. (*See generally* Ex. 1-47, Plaintiff’s *Corrected* Rule 26(a)(2)
19 Expert Report of Henry Fishkind, Ph.D in Support of Class Certification.) As such, the Court can
20 determine both Defendants’ classwide liability, as well as the damages owed to any particular
21 member, by applying the expert’s formula to common evidence (i.e., App purchase records). *See In*
22 *re Rubber Chems.*, 232 F.R.D. at 354 (finding commonality regarding damages where plaintiffs’
23 expert proffered two accepted methodologies for calculating damages using classwide proof).

24 Accordingly, this too is a question common to the Class and Subclass, and Rule 23(a)’s
25 commonality requirement is satisfied.¹²

26
27 ¹² Likewise, whether Defendants breached the contracts or their duty of good faith and fair
28 dealing, or violated the UCL, present common questions of law, particularly given the California
choice of law provision found in their terms.

1 **C. Plaintiff's claims are typical of those of the proposed Class and Subclass.**

2 Next, Rule 23's typicality prerequisite requires that Plaintiff's claims be typical of those of
3 the other members of the Class and Subclass. Fed. R. Civ. P. 23(a)(3). The focuses of the typicality
4 analysis are "whether other members have the same or similar injury, whether the action is based on
5 conduct which is not unique to the named plaintiffs, and whether other class members have been
6 injured by the same course of conduct." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168,
7 1175 (9th Cir. 2010) (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)).
8 Like commonality, typicality is viewed "permissive[ly]," and the standard is satisfied if the
9 representative's claims "are reasonably co-extensive with those of the absent class members; they
10 need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998);
11 *see also* 5 Alba Conte & Herbert Newberg, *Newberg on Class Actions*, § 24.25 (3d ed. 1992)
12 (Typicality "does not mean that the claims of the class representative must be identical or
13 substantially identical to those of the absent class members.").

14 Plaintiff's claims are interchangeable with those of the absent Class and Subclass members.
15 As with the other members, she (i) purchased an App from the Play Store using Google Wallet
16 between March 1, 2012 and April 30, 2014; (ii) the App cost less than \$300 (in fact, only \$1.77);
17 and (iii) her Google Wallet account was tied to her credit card at the time. (See Ex. 1-30 at GOOG-
18 00001392; Ex. 1-15 at GOOG-00001089; Ex. 1-31 at GOOG-00001090-1092; Ex. 1-16 at GOOG-
19 00001093; Ex. 1-32 at GOOG-00001394; Ex. 1-33 at GOOG-00001190; Ex. 1-48, D [REDACTED]
20 [REDACTED]
21 83:4-10 [REDACTED]
22 [REDACTED] 132:14-16 ([REDACTED]
23 [REDACTED]).) Moreover, because the vendor from which Plaintiff purchased her App—a company
24 named YCDroid—is a UK-based entity, she, like every Subclass member, purchased an App from a
25 vendor located in the EU. (See Ex. 1-49 at GOOG-00001010 ([REDACTED]
26 [REDACTED]); Ex. 1-50 at GOOG-00001012 [REDACTED]
27 [REDACTED]); Ex. 1-31 at GOOG-00001090 ([REDACTED]) Just
28 like every other Class and Subclass member, Defendants disclosed her personal information (i.e.,

1 her name, email address, and zip code) to an App vendor without her consent. (*See* Ex. 1-13 at Ans.
2 Interrog. No. 1.) And as a result, Plaintiff suffered the same damages as the Class and Subclass, and
3 is entitled to like restitution: the loss of the benefit of her bargained-for privacy protections and the
4 diminution in value of her personal information. (*See* Ex. 1-47 at 3-6; dkt. 118 at 7–9.)

5 Accordingly, Plaintiff’s claims “are reasonably co-extensive” with those of the absent Class
6 and Subclass members, and Rule 23(a)’s typicality requirement is satisfied as well.

7 **D. Plaintiff and her counsel are more than adequate representatives.**

8 Rule 23(a)’s final prerequisite—adequacy—is satisfied where the “representative parties
9 will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). The adequacy
10 analysis has two components: whether the named plaintiff and her counsel have any conflicts of
11 interest with other class members, and whether plaintiff and her counsel will prosecute the action
12 vigorously on behalf of the class. *Hanlon*, 150 F.3d at 1020.

13 Here, there are no conflicts of interest between Plaintiff (or her counsel) and the other Class
14 or Subclass members, as they all have been injured in the same manner by Defendants’ unlawful
15 disclosures and all seek the same relief—i.e., damages equal to the lost benefit of their bargain and
16 the diminution in the value of their personal information. Moreover, Plaintiff’s participation in this
17 case goes above and beyond what courts in this District consider adequate. Her involvement began
18 in August 2013 (*see* Ex. 1-48 at 39:21-22), when she retained Progressive Law Group as her
19 counsel and began assisting them with their pre-suit investigation. (*Id.* at 145:12-24 ([REDACTED]
20 [REDACTED]).) Following the filing
21 of this action, Plaintiff, herself a lawyer, reviewed and provided input on the amended complaint
22 prepared and filed by her counsel. (*Id.* at 145:19-21.) After the Court denied Defendants’ motion to
23 dismiss, in part, Plaintiff assisted in the preparation of her discovery responses, including producing
24 information to aid in drafting interrogatory responses, providing documentation, and reviewing draft
25 responses. (*Id.* at 146:5 ([REDACTED] 146:8-11 [REDACTED]
26 [REDACTED]).) She also sat for a deposition, where she demonstrated her understanding of
27 the issues in the case and her commitment to honoring her duties to the Class. (*Id.* at 40:18-21 ([REDACTED]
28

1 [REDACTED] *id.* at
2 43:12-16 [REDACTED]
3 [REDACTED]
4 [REDACTED] Thus, Plaintiff has shown a commitment to
5 pursuing the Class and Subclass’s claims and she more than satisfies Rule 23’s adequacy
6 requirement. *See Trosper v. Styker Corp.*, No. 13-cv-607, 2014 WL 4145448, at *13 (N.D. Cal.
7 Aug. 21, 2014) (finding class representative adequate where he had “demonstrated his commitment
8 to the case and ha[d] indicated he [would] vigorously prosecute the action on behalf of the class.”).

9 For their part, proposed Class Counsel are also adequate representatives of the Class and
10 Subclass and they have and will continue to “prosecute the action vigorously on [their] behalf...”
11 *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011). Under Rule 23(g), factors such
12 as the work counsel have done in identifying or investigating potential claims, their experience in
13 handling other class actions, their knowledge of the law, and the resources they will commit to the
14 case are all indicative of adequacy. Fed. R. Civ. P. 23(g). Here, through substantive motion practice,
15 extensive discovery—including eleven depositions of Google employees (and two experts), service
16 and review of hundreds of discovery requests, and review of more than 10,000 pages of responsive
17 documents—and oversight of expert discovery, proposed Class Counsel have committed substantial
18 resources to investigating and litigating the claims in this case, which have now been pending for
19 four years. (*See* Declaration of Rafey S. Balabanian (“Balabanian Decl.”) ¶ 3.)

20 In terms of experience, proposed Class Counsel are well-respected members of the legal
21 community with extensive experience litigating class actions of similar size, scope, and complexity,
22 particularly relating to consumer privacy issues. Lawyers at Edelson PC have been recognized as
23 “pioneers in the electronic privacy class action field, having litigated some of the largest consumer
24 class actions in the country on this issue.” *In re Facebook Privacy Litig.*, No. 10-cv-2389, dkt. 69 at
25 5 (N.D. Cal. Dec. 10, 2010); *see also Harris v. comScore*, No. 11-cv-5807, dkt. 186, 369 (N.D. Ill.)
26 (securing adversarial certification of largest ever privacy class comprised of 10 million consumers
27 on claims arising under federal privacy statutes and ultimately achieving a \$14 million non-
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1 reversionary settlement with claiming class members receiving approximately \$500 each). Indeed,
2 in appointing Edelson PC as interim lead counsel of four consolidated actions relating to a
3 defendant's failure to honor its privacy and security promises, Judge Davila of the Northern District
4 of California noted that the firm is "experienced in class action litigation and, in particular, in class
5 action litigation involving technology and privacy." *In re LinkedIn User Privacy Litig.*, No. 12-cv-
6 3088, dkt. 40 at 3 (N.D. Cal. Aug. 29, 2012); *see also Resnick v. AvMed, Inc.*, No. 10-cv-24513
7 (S.D. Fla.) (Edelson PC obtaining the first data breach class action settlement to provide a class with
8 cash recovery based on overpayment for data security without requiring evidence of identity theft);
9 *Aranda v. Caribbean Cruise Line, Inc.*, No. 12-cv-4069, 2016 WL 1555576 (N.D. Ill. Apr. 18,
10 2016) (after obtaining class certification, Edelson PC obtained summary judgment on liability for
11 claims under the Telephone Consumer Protection Act, 47 U.S.C. § 227).

12 Similarly, Progressive Law Group, including the Madison, Wisconsin and Chicago, Illinois
13 firms, concentrate in class litigation and have litigated and successfully prosecuted numerous class
14 actions. And their committed advocacy in this matter likewise demonstrates their adequacy. (*See*
15 *Declaration of Mark Bulgarelli*, attached as Exhibit 2.)

16 For these reasons, Plaintiff and her counsel have been—and will continue to be—adequate
17 representatives of the Class and Subclass, and her attorneys should be appointed as Class Counsel
18 pursuant to Fed. R. Civ. P. 23(g). *See Sitt v. San Francisco Muni. Transp. Agency*, No. 12-cv-3704,
19 2014 WL 1760623, at *7 (N.D. Cal. May 2, 2014) (adequacy "generally met with members of the
20 bar in good standing typically deemed qualified and competent to represent a class absent evidence
21 to the contrary.").

22 **IV. The Proposed Class and Subclass Meet Rule 23(b)(3)'s Requirements.**

23 In addition to meeting the prerequisites of Rule 23(a), the Class and Subclass must also meet
24 one of the three requirements of Rule 23(b). Here, Plaintiff seeks certification under Rule 23(b)(3),
25 which requires that common questions of law or fact predominate over individual ones, and that a
26 class action is superior to individual actions. Fed. R. Civ. P. 23(b)(3). Those requirements are
27 satisfied as well.

1 **A. Common questions of law and fact predominate.**

2 Rule 23(b)(3)'s predominance requirement "tests whether proposed classes are sufficiently
3 cohesive to warrant adjudication by representation," *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591,
4 623 (1997), and is met where the common questions "predominate over any questions affecting
5 only individual members." Fed. R. Civ. P. 23(b)(3). Predominance tests the balance between
6 common questions, where "the same evidence will suffice for each member to make a prima facie
7 showing [or] the issue is susceptible to generalized, class-wide proof," and individual ones, which
8 call for "evidence that varies from member to member." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.
9 Ct. 1036, 1045 (Mar. 22, 2016) (citations and internal quotations omitted). Although determining
10 whether questions of law or fact predominate "begins, of course, with the elements of the
11 underlying cause of action," *Erica P. John Fund, Inc.*, 563 U.S. at 809, "proving predominance
12 does not require plaintiffs to prove that every element of a claim is subject to classwide proof: they
13 need only show that common questions predominate over questions affecting only individual class
14 members." *In re: Cathode Ray Tube (CRT) Antitrust Litig.*, 308 F.R.D. 606, 612 (N.D. Cal. 2015)
15 (citing *Amgen Inc. v. Ct. Retire. Plans and Trust Funds*, 133 S. Ct. 1184, 1196 (2013)). Here, each
16 element of Plaintiff's claims can be proven by reference to common evidence.

17 First, with respect to the breach of contract claim, common issues predominate as to each
18 element: (1) existence of a contract, (2) Class members' performance or excuse for
19 nonperformance, (3) defendant's breach, and (4) resulting damages. (*See* dkt. 118 at 5.) As to the
20 first element, each Class and Subclass member was presented with a materially identical Privacy
21 Policy in a similar fashion, and each agreed to it in the same way (i.e., clicking a button). (*See* Ex.
22 1-4 at 157:6-10; Ex. 1-12 at GOOG-00002898 [REDACTED]
23 [REDACTED]); Ex. 1-51 at GOOG-00005015.) As to the second, each member performed their
24 obligations in the same manner by purchasing and paying for an App. *See In re Med. Cap. Sec.*
25 *Litig.*, No. 10-cv-2145, 2011 WL 5067208, at *3 (C.D. Cal. July 26, 2011) (collecting cases); *see*
26 *also Sacred Heart Health Sys., Inc. v. Humana Mil. Health.*, 601 F.3d 1159, 1171 (11th Cir. 2010)
27 ("It is the form contract, executed under like conditions by all class members, that best facilitates
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1 class treatment.”). The same is true for the third element, as each Class and Subclass member
2 asserts that disclosure of their names and email addresses to the App vendors was unnecessary, that
3 the disclosure of their cities, states, and zip codes was not necessary for tax purposes, and, as to the
4 Subclass, that disclosure of any information beyond their country of residence to the App vendors
5 was also unnecessary for tax purposes. *See In re Med. Cap. Sec. Litig.*, 2011 WL 5067208, at *3.
6 Finally, while the Ninth Circuit has made clear that classwide proof of damages is not required for
7 certification, Plaintiff, through expert testimony, has provided for a common methodology for
8 calculating such damages, and the facts and Defendants’ records similarly provide common proofs
9 that may be used to calculate damages.¹³

10 Second, common issues also predominate as to the claim for breach of the implied covenant
11 of good faith and fair dealing. “‘The implied promise [of good faith and fair dealing] requires each
12 contracting party to refrain from doing anything to injure the right of the other to receive the
13 benefits of the agreement.’” (Dkt. 118 at 10 (quoting *Avidity Partners, LLC v. State of Cal.*, 221
14 Cal. App. 4th 1180, 1204 (2013) (citation omitted).) Where the “duty of good faith and
15 reasonableness is rooted in form contracts and the application of uniform policies to the rights and
16 obligations under those contracts,” common issues predominate. *Ellsworth*, 2014 WL 2734953, at
17 *27. “The duty does not require examining each plaintiff’s individual expectations because those
18 . . . are reflected in the contract.” *Id.* As this Court identified in its order denying, in part,
19 Defendants’ motion to dismiss, the claims for breach of that covenant are rooted in Defendants’
20 “blanket, universal disclosure” of Buyers’ personal information frustrating the purpose of the
21 Privacy Policies. (Dkt. 118 at 10.) Thus, the question of whether Defendants frustrated the purpose
22 of their contracts with the Class and Subclass is simply a matter of comparing a common course of
23 conduct to common contractual terms. *See Ellsworth*, 2014 WL 2734953, at *27 (finding common

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25 ¹³ Courts have routinely certified breach of contract actions where an express term of a
26 uniformly applicable contract was at issue. *See, e.g., Ballard v. Equifax Check Services, Inc.*, 186
27 F.R.D. 589, 595 (E.D. Cal. 1999) (“claims arising from interpretations of a form contract appear to
28 present the classic case for treatment as a class action”); *see also Menagerie Productions v. Citysearch*, No. CV 08-4263 CAS (FMO), 2009 U.S. Dist. LEXIS 108768, *36 (C.D. Cal. Nov. 9, 2009) (certifying class under breach of contract claim arising “from a standard form contract prepared by [defendant] to which all advertisers in the class agreed.”).

1 issues to predominate as to good faith and fair dealing claim arising out of form contract).

2 Finally, common issues also predominate for the UCL claim. That claim is asserted under
3 the UCL's unlawful and unfair prongs, both of which are rooted in Defendants' disclosure of
4 Buyers' information in violation of the Privacy Policies. (Dkt. 118 at 16–17.) To state a claim under
5 the UCL's "unlawful" prong, Class members must only show that Defendants' conduct violated any
6 law. (*Id.* at 16.) As the Court recognized in its order on Defendants' last motion to dismiss,
7 Plaintiff's unlawful-prong claim "relies upon alleged violations of California Business and
8 Professions Code § 22576, which prohibits an operator of a commercial web site or online service
9 from failing to comply with its own privacy policies," (*id.*), and a showing of economic harm. (*Id.*
10 at 15.) Given Defendants' uniform conduct, common issues predominate over individual ones as to
11 the unlawful-prong claims. To start, Defendants are plainly "operators of a commercial web site or
12 online service" as to each Class and Subclass member, as each Privacy Policy specifically governs
13 the use of Defendants' online services. (*See, e.g.*, Ex. 1-37 at GOOG-00000383; Ex. 1-38 at
14 GOOG-00000084; Ex. 1-8 at GOOG-00000110; Ex. 1-40 at GOOG-00000187, Ex. 1-41 at GOOG-
15 00000222; Ex. 1-42 at GOOG-00000310; Ex. 1-43 at GOOG-00000856; Ex. 1-44 at GOOG-
16 00000990; Ex. 1-7 at GOOG-00000997; Ex. 1-45 at GOOG-00001020.) Moreover, Defendants'
17 violation of the Privacy Policies is uniform across the Class and Subclass: each member asserts that
18 Defendants unnecessarily disclosed their personal information. Thus, the issue of whether
19 Defendants' conduct was unlawful can be determined on a classwide basis. *See Gaudin v. Saxon*
20 *Mortgage Servs., Inc.*, 297 F.R.D. 417, 430 (N.D. Cal. 2013) (finding predominance under UCL
21 claim arising out of form contract and "Defendant's uniform practices as they apply generally to the
22 Proposed Class"). Finally, and as established above, common issues predominate as to damages
23 given Defendants' uniform conduct and Plaintiff's expert's proposal of a common methodology for
24 calculating damages. (*See supra* § II(B)(4).)

25 The Class's and Subclass's claims under the UCL's "unfair" prong are also predominated by
26 common issues. As the Court also recognized in its order on Defendants' motion to dismiss, while
27 the California Supreme Court has not established a definitive test for evaluating violations of the
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1 unfair prong, three tests have emerged for assessing unfair claims. (Dkt. 118 at 16–17.) The first
2 requires a plaintiff to show the violation of some public policy “tethered to [a] specific
3 constitutional, statutory, or regulatory provision[.]” (*Id.* at 17 (quoting *Drum v. San Fernando*
4 *Valley Bar Ass’n*, 182 Cal. App. 4th 247, 257 (2010))). The second requires a showing that the
5 practice at issue is “immoral, unethical, oppressive, unscrupulous or substantially injurious to
6 consumers and requires the court to weigh the utility of the defendant’s conduct against the gravity
7 of the harm to the alleged victim.” (*Id.* (quoting *Drum*, 182 Cal. App. 4th at 257).) The third
8 requires that the injury be “substantial,” that it “not be outweighed by any countervailing benefits to
9 consumers or competition,” and that the consumers “could not reasonably have avoided” the injury.
10 *Id.* (quoting *Drum*, 182 Cal. App. 4th at 257).) In its order on Defendants’ motion to dismiss, the
11 Court noted that Plaintiff stated a claim because she alleged that Defendants’ disclosures of
12 personal information were “oppressive, immoral, unethical, and unscrupulous,” and that the
13 disclosures caused substantial consumer injury without any countervailing benefit. (Dkt. 118 at 17.)

14 Here, the evidence shows that Plaintiff’s theory under the unfair prong is predominated by
15 common issues. Because each Class and Subclass member alleges breach of the same Privacy
16 Policies in the same way by Defendants’ uniform conduct, whether that conduct was in fact
17 oppressive, immoral, unethical, and unscrupulous can be evaluated commonly. *See In re Nat. W.*
18 *Life Ins. Deferred Annuities Litig.*, 268 F.R.D. 652, 669 (S.D. Cal. 2010) (“On the unfair prong, the
19 Court must come to the same conclusion. The evidence to date shows class-wide practices by
20 Defendant. There is no indication that the ‘unfairness’ of those practices differs from individual to
21 individual.”). Likewise for the effects of the injury: because each Class and Subclass member was
22 subject to the same conduct and suffered the same harm as a result, the question of whether
23 Defendants’ conduct caused them “substantial” injury can be addressed uniformly. As a result,
24 common issues predominate over the Class’s and Subclass’s claims under the UCL’s unfair prong.

25 In other words, because each element of the Class’s and Subclass’s claims can be
26 determined by reference to common evidence, common issues certainly predominate and this
27 requirement is met. *See Ellsworth*, 2014 WL 2734953, at *20 (noting that “courts routinely certify
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1 class actions regarding breaches of form contracts” in cases alleging breach of contract, breach of
2 implied covenant of good faith and fair dealing, and UCL claims) (collecting cases).

3 **B. A class action is the superior method for resolving this controversy.**

4 Lastly, Rule 23(b)(3)’s superiority requirement seeks to assure that a class action is the
5 “most efficient and effective means of resolving the controversy.” *Wolin*, 617 F.3d at 1175. “Where
6 recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis,
7 this factor weighs in favor of class certification.” *Id.* Here, the potential recovery to any member of
8 the proposed Class and Subclass is relatively small—on the order of a few cents per purchase. (Ex.
9 1-47 at ¶ 20.) Given that, the only alternative to a class action—thousands of individual actions in
10 small claims court—would be both incredibly inefficient (as each consumer would present the same
11 arguments and evidence) and unrealistic (as the costs of litigation would quickly exceed the
12 potential return in each individual case). (Balabanian Decl. ¶ 5.) Indeed, discovery here has gone on
13 for years and has involved the production and review of thousands of pages of responsive
14 documents (using common, but expensive, e-discovery platforms), numerous depositions of
15 Defendants’ employees, the retention of a damages expert and depositions of rebuttal experts. (*Id.*)
16 That substantial cost would outweigh the minimal recovery available to any individual. *See, e.g.,*
17 *Wolin*, 617 F.3d at 1176 (“The amount of damages suffered by each class member is not large.
18 Forcing individual [consumers] to litigate their cases, particularly where common issues
19 predominate for the proposed class, is an inferior method of adjudication.”) (internal quotations
20 omitted); *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d
21 1152, 1163 (9th Cir. 2001) (finding superiority “easily satisfied” where “[i]f plaintiffs cannot
22 proceed as a class, some—perhaps most—will be unable to proceed as individuals because of the
23 disparity between their litigation costs and what they hope to recover.”).

1 **CONCLUSION**

2 For the foregoing reasons, Plaintiff Svenson respectfully requests that this Court enter an
3 order (1) certifying the proposed Class and Subclass; (2) appointing Plaintiff as representative of the
4 Class and Subclass; (3) appointing Jay Edelson, Rafey S. Balabanian, and Benjamin H. Richman of
5 Edelson PC, and Frank Jablonski and Mark Bulgarelli of Progressive Law Group, LLC as class
6 counsel; and (4) granting such other and further relief as the Court deems reasonable and just.

7 Respectfully submitted,

8 **ALICE SVENSON**, individually and on behalf of all
9 others similarly situated,

10 Dated: June 3, 2016

By: /s/ Rafey S. Balabanian
One of Plaintiff's Attorneys

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CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2016, I electronically filed the above and foregoing with the Clerk of Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ Rafey S. Balabanian